IN THE SUPREME COURT

Appeal from the Court of Appeals
Honorable Bandstra, C.J., and Whitbeck and Owens, JJ.

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

vs. **Docket No. 120630**

RICHARD J. MENDOZA,
Defendant-Appellee.

DEFENDANT-APPELLEE'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

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Plaintiff says no. Court of Appeals would say yes. Defendant says yes.

COUNTER-STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant-Appellee Richard Mendoza was charged with first-degree murder, in violation of MCL § 750.316, and felony firearm, in violation of MCL § 750.227b.

In the course of the trial there was evidence that decedent William "Freaky Will" Stockdale was a "pretty big" man who also went by the aliases "Freaky Mike" and "Freaky Chuck." (7b-8b, 36b). Will Stockdale was a drug dealer who used firearms to facilitate his drug sales. (7b).

Prosecution witness Thurman Chillers testified that on October 30, 1997, at 1:30 p.m., he was sitting on the couch in the living room at 19960 Annott, Detroit. (24a). Chillers lived there with his uncle, decedent Will Stockdale. (24a). He and his uncle were in the business of selling drugs out of their home, which he admitted was a "dope house." (26a, 30a; 6b-7b). Stockdale was in the bedroom; Chillers was in the front room sitting on the couch, when Mr. Mendoza knocked at the front door, wanting to buy some marijuana. (23a-26a).

Chillers used drugs at the house, and was smoking marijuana just before the incident. (15b). He was "high" when the incident occurred, and his ability to remember was "somewhat" affected. (15b). He admitted there were "a lot of weapons in that house," including a rifle, a .380, and "a bunch of ammunition" that was "all over the place." (16b). He admitted he knew how to use those

weapons. (17b). He admitted that on some days he was armed when he sold drugs, probably with a .380 on his lap, but claimed that on that particular day he was not armed. (32b). He said his uncle would carry a gun while dealing drugs, perhaps a .357 Magnum, but indicated "you just grab" any gun, "Like no exact specific one." (33b-34b).

Chillers said defendant had come by the house the day before the incident [on October 29, 1998], to buy some marijuana. A companion was with him, in a gray car. (26a-27a).

The day of the incident, October 30th, Mr. Mendoza came to the door alone. (29a). The wooden door was open, but a black iron grate across the doorway was shut and locked. (31a-32a). Richard Mendoza asked, "How much for an ounce of weed?" Chillers relayed the question to Freaky Will, who responded, "$160" and then came out of the bedroom. (30a). When Freaky Will came out of the bedroom, he had on blue jeans and no shirt. (30a). At that time, Chillers said, Freaky Will did not have a weapon. (31a).

Defendant Mendoza said he had to go get the rest of the money from his friend. (40a, 45a). Then he left. Chillers was sitting on the couch. (45a). When Mr. Mendoza returned to the house, he had money in his hand. (18b). He was with Mr. Tims. Chillers said as Will Stockdale went back toward his bedroom, defendant pulled out a gun, a "black automatic." (45a-46a, 49a).

According to Chillers, defendant said "shoot him." Chillers did not know who Defendant meant by "him." Tims turned, pointed a gun at Chillers, then pointed it back towards decedent Stockdale. Then Stockdale rushed defendant, grabbed the gun and swung it downward, and Chillers ran through the kitchen. (3b-4b). When he left the house, his uncle was in the front room "tussling with" defendant. (31b). As he ran through the kitchen he heard one shot; once outside, he heard four or five more shots. (69a). He ran down the street to the house of one of his drug customers, where the police were called. (69a-70a). He was there about five or ten minutes, when a lady came out. (70a). She asked who was sitting on his uncle's porch. He then went back to the house and saw his uncle sitting on a chair on the porch, shot. (78a). His uncle was taken out onto the lawn. (79a).

Chillers said that right after the incident, the police arrived. (19b). He claimed the police "told me to go get his ID. I went and got his ID" from his room. (79a). However, Officer Vincent Crockett testified that he was the first officer on the scene, and that Thurman Chillers was outside at that time. Because this was a potential homicide scene, the officer would not have let Thurman Chillers go back inside the house. (38b-41b).

Chillers described a struggle in the living room only, but the police found blood in the living room, hall, and both the northeast and northwest bedrooms.

(49b). A bullet hole in the wall, near the front door, was right across from the couch. (28b). The police seized a .357 blue steel revolver from the bedroom floor, which had been fired four times. They also recovered three spent .357 casings from the bedroom floor. (42b-43b). The police also seized a .380 blue steel automatic next to the bed. (44b). Police Officer Yakomovich seized a pistol magazine with seven 9 mm live rounds from the front porch, at the door. (46b).

Chillers admitted that once the police came, they did not accept his story, but placed him in a police car for three or four hours and interrogated him. He denied firing a weapon, but the police took him to the station and gave him a gunpowder residue test to see if he fired a gun. (101a). He knew the test "came up positive" for gunshot residue, yet maintained "I didn't fire a gun." (101a).

Chillers claimed that the police told him to go into the bedroom, and he saw "about three" guns were visible. (79a-80a). However, he also said he was "running around trying to hide evidence in the house" and "moving guns around" before the police arrived. (19b-19.1b). Chillers said he picked up a .357 Magnum and tried to hide it. (19.1b, 100a). He picked up the gun and stated, "It took me about a minute to put it back down." While he held the gun, he was thinking about what he was going to do, either ditch the gun or keep it. (23b). Chillers identified People's Exhibit 5 as the gun he picked up from the bedroom floor. (80a). People's Exhibit 9 was another gun on the stand by his uncle's bed. (81a).

Chillers denied selling crack out of the house. (9b). Chillers had admitted in testimony under oath at the preliminary examination that when defendant had asked about weed, Chillers responded that he "just had crack." (10b-13b). When confronted with his former testimony, "I just had crack," he initially denied it, saying, "They wasn't [sic] my words." (13b). He denied any knowledge of the crack the police found right next to him on the couch. (14b). Later when asked, "you testified under oath that you were selling crack, right?" he stopped denying it, responding, "It's on the paper, so I guess so." (22b). Later he read into the record his preliminary examination testimony that when he opened the door, he said "I just had crack. He said, How much an ounce? . . . I said I had to ask my uncle." (103a-104a; 30b).

Although Chillers had signed his written statement to the police, he denied its accuracy. (24b-25b). The statement indicated "the first guy [Mendoza] said shoot him, meaning my uncle, when they started tussling," but Chillers said "That wasn't supposed to have been worded like that." (26b). He denied that he told Sgt. Kirk that he did not hear the words "shoot him, shoot him" until after they were tussling over the gun. (26b-27b).

Chillers denied shooting Mr. Mendoza in the chest. (100a). Chillers did not know how gunpowder residue got on his hands. (32b). He did not know how Mr. Mendoza got hit in the face with a pistol, got four stitches on his head, or got

shot in the back and the chest. (35b). Chillers denied any deal with the prosecutor for his testimony. However, he admitted that although he concededly was selling marijuana out of the house, he had not been charged. (29b).

Police Sgt. Voizell Jennings took a statement from Mr. Mendoza, indicating that Mr. Mendoza was in the house to buy some marijuana when Ivan Tims and the "big guy with the deep voice" [decedent] began tussling. He heard "approximately two" gunshots. "They then fell into a corner over a chair. I then heard the 'frail guy' [Thurman Chillers] holler." Then Chillers pulled a shiny revolver and pointed it at Ivan Tims and the guy he was tussling with [decedent]. (127a-128a). Mr. Mendoza stated:

> I then tried to knock the gun away from the frail guy. As I was attempting to knock the gun away from the frail guy, he (frail guy) pulled the trigger. I then tried to run but I tripped over Ivan or the guy he was tussling with feet. (Sic). I then got up and ran out the house and I started feeling pain and I [was]] hearing shots. I looked back and the shots are coming from a bedroom window. I then see Ivan coming out [of] the house . . . By this time I was bent over and Ivan grabbed me and asked me was I all right. I told him no. I'm hurt. Ivan then helped [me] to the car and drove off. (130a-131a).

Mr. Mendoza described the decedent as a black male, a "big dark-skinned guy with a deep voice," about 26 years old, 5'10" or 5'11", with a muscular build. (127a, 131a).

Forensic chemist William Steiner testified Thurman Chillers tested positive for the presence of gunshot residue in the web area of his right hand.

This indicated either he had fired a weapon or had picked up and handled a recently fired weapon or had been standing in very close proximity to somebody else who had fired a weapon. (186a). The gunshot residue test on Mr. Mendoza produced results that were consistent with gunshot residue but not sufficient to conclude with certainty that it was gunshot residue. (187a). This is because the three elements involved, lead, barium and antimony, are also found in other things and could get on the skin in other ways than through proximity to guns being shot. (187a; 47b). The particles found on Mr. Mendoza "may or may not have come from the firing of a gun." (48b). The particles were not chemically combined, which would have been conclusive. (48b). There was a "very strong possibility scientifically" that the findings could have been caused from something other than a gunshot. (50b).

The chemist related that when Ivan Tims was questioned regarding handling or discharging a firearm, he responded that he had "fired a 12 gauge [shotgun] the day before yesterday and also that he fired a pistol, a .38 caliber snub-nose revolver, black with a hammer guard." (51b).

Autopsy revealed the cause of Stockdale's death was a gunshot wound to the chest. (179a). Although the prosecution's theory was that defendant shot decedent in a struggle over a gun, there was no evidence of close-range firing on the skin around the entry wound. Close-range firing was defined as "usually

within two feet." The medical examiner stated that the clothing could have been between the gun and the skin, leaving soot on the clothing, with no remnant on the skin; but the medical examiner's office did not test the clothing. (181a-182a).

The trial court refused defendant's request to instruct on the lesser offense of involuntary manslaughter. (214a-224a). Defendant was convicted of second-degree murder, in violation of MCL § 750.317, and felony firearm, in violation of MCL § 750.227b, and sentenced to 25-45 years imprisonment for murder, consecutive to a two-year term for felony firearm. The Court of Appeals granted a new trial, and denied plaintiff's motion for rehearing. This Court granted the People's Application for Leave to Appeal. Further facts appear in relevant portions of the following argument.

ARGUMENT

I. THE DEFENSE DOES NOT CONTEST THE PROSECUTION'S ARGUMENT THAT MANSLAUGHTER IS A LESSER-INCLUDED OFFENSE OF MURDER. BECAUSE THE PARTIES DO NOT DISAGREE ON THE MAIN ISSUE CONCERNING THIS COURT, LEAVE TO APPEAL WAS IMPROVIDENTLY GRANTED, AND THIS COURT SHOULD DISMISS THIS APPEAL.

Standard of Review: There is no applicable standard of review, as the Court of Appeals was not presented with, and did not decide, this issue.

Defendant contends that the Court of Appeals did not err in finding that the evidence in this murder case warranted instructions on the lesser offense of involuntary manslaughter, and that the error required a new trial. This Court's order granting leave to appeal stated:

> The parties are directed to include among the issues to be briefed under what circumstances, if any, MCL 768.32(1) allows a person charged with murder to have a manslaughter instruction, in light of our opinion in *Cornell* [*infra*]. In addressing this question, the parties shall specifically consider whether manslaughter is a necessarily included lesser offense or cognate offense of murder. (10a).

The People argue that involuntary manslaughter is a necessarily lesser-included offense to murder, but that the evidence of an accidental discharge did not justify a manslaughter instruction in this case, based on a rational view of the evidence.

Defendant agrees with the People that involuntary manslaughter is a lesser included offense of murder, and instructions on that lesser offense are permissible under MCL § 768.32. *Hanna v People*, 19 Mich 316, 320-322 (1869) (interpreting predecessor of MCL § 768.32 to mean that one charged with first-degree murder could be convicted of "any degree" of an "inferior" offense, including both second-degree murder and manslaughter); *People v Milhem*, 350 Mich 497; 87 NW2d 151, 155 (1957) (in murder case, trial court instructed on "the third degree of homicide, which is known as manslaughter"; held, "this charge is entirely consistent with the statute and with previous cases defining manslaughter handed down by this court").

The view that manslaughter is a crime of inferior degree to a charge to murder has deep roots in our jurisprudence. As the United States Supreme Court correctly noted more than a century ago:

> Manslaughter, at common law, was defined to be the unlawful and felonious killing of another without any malice, either express or implied . . . The presence or absence of this malice or mental condition marks the boundary which separates the two crimes of murder and manslaughter.

Stevenson v United States, 162 US 313, 320, 323; 16 S Ct 839; 40 LEd 980 (1896) (where defendant and decedent each threatened the other with firearms, then defendant fired pistol, killing deceased, the trial court erred in refusing the

defense request for a manslaughter instruction, because "the grade of the crime, whether murder or manslaughter, should have been submitted to the jury").

The view of manslaughter as a lesser-included offense of murder was the law of this state, until *People v Van Wyck*, 402 Mich 266, 269; 262 NW2d 638 (1978). In *Van Wyck*, the Court stated that voluntary manslaughter was not a necessarily lesser-included offense, because it is not "impossible to commit first- or second-degree murder without having first committed manslaughter." The Court reached this conclusion by reasoning that "the absence of mitigating circumstances need not be established to convict of first- or second-degree murder."

Defendant agrees with the People that *Van Wyck* was wrongly decided. *Van Wyck* failed to consider that it was well established in Michigan jurisprudence that manslaughter was a necessarily lesser included offense to murder. Manslaughter did not, as *Van Wyck* stated, require proof of additional elements. Manslaughter, like murder, involves an unlawful killing; but in manslaughter, malice is absent. Manslaughter is "the unlawful killing of another without malice, express or implied . . . [and] is distinguished from murder in that the element of malice, express or implied, which is the very essence of murder, is absent." *People v Clark*, 5 Mich App 672; 147 NW2d 704, 706 (1967) (internal citations omitted).

Defendant submits that the correct view was stated long ago by this Court:

> "Homicide" is the killing of a human being by a human being. It may or may not, be felonious. If felonious, it is either murder or manslaughter, dependent upon the facts and circumstances surrounding the killing.

People v Austin, 221 Mich 635; 192 NW 590, 593 (1923); *see also People v Paul*, 395 Mich 444; 236 NW2d 486, 488 (1975) (where evidence showed victim was killed by shotgun blast from gun held by defendant in dope house, evidence was sufficient to sustain conviction on lesser offense of statutory manslaughter under MCL § 750.329m "a lesser included offense of first degree murder"); *People v McArron*, 121 Mich 1, 79 NW 944, 945 (1899) (charge of murder includes the lesser offense of manslaughter); *People v Prague*, 72 Mich 178; 40 NW 243 (1888) ("if charged with murder in the first degree, [defendant] may be convicted of murder in the second degree, or of manslaughter, or of assault and battery").

> [T]he absence of malice in involuntary manslaughter arises . . . because the offender's mental state is not sufficiently culpable to meet the traditional malice requirements. Involuntary manslaughter is an unintentional killing that evinces a wanton or reckless disregard for human life, but not of the extreme nature that will support a finding of malice.[1]

As this Court has stated: "Involuntary manslaughter is a catch-all concept including all manslaughter not characterized as voluntary." *People v Datema*, 448 Mich 585; 533 NW2d 272, 276 (1995). Involuntary manslaughter includes the killing of another without malice and unintentionally, but in doing some

[1] *United States v Anderson*, 201 F3d 1145 (CA 9, 2000).

unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm. *People v Daniels*, 172 Mich App 374; 431 NW2d 846, 849 (1988). The usual situations in which involuntary manslaughter arises are either when death results from a direct act not intended to produce serious bodily harm or when death results from criminal negligence. *Id.*

Criminal negligence requires: (1) knowledge of a situation requiring the exercise of ordinary care and diligence to avert injury to another; (2) ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand; and (3) the omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. *People v Sealy*, 136 Mich App 168, 172-173; 356 NW2d 614 (1984).

> Criminal negligence, also referred to as gross negligence, lies between the extremes of intention and negligence. As with intention, the actor realizes the risk of his behavior and consciously decides to create that risk. As with negligence, however, the actor does not seek to cause harm, but is simply "recklessly or wantonly indifferent to the results."

People v Datema, 533 NW2d at 280.

In granting leave to appeal, this Court specifically directed the parties to focus on the application of *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002). A comparison of the People's brief and this brief shows the parties agree that manslaughter is a lesser-included offense to murder, and that consequently

Cornell should not preclude manslaughter instructions in murder cases. Thus, the issue of principal concern to this Court, an issue of significance far beyond the outcome of this particular case, is uncontested by the parties. This Court cannot fairly decide this issue, with the case in this posture.

As the application of *Cornell* is not disputed by the parties, all that remains is the question whether there was substantial evidence to warrant an involuntary manslaughter instruction and to require a new trial, as the Court of Appeals directed. This rather routine question does not rise to the level of significance that should require the attention of this Court. This Court should find that leave was improvidently granted, and that dismissal is the proper remedy. *People v Blachura*, 396 Mich 723; 242 NW2d 390, 391 (1976).

II. DEFENDANT WAS CHARGED WITH MURDER. THERE WAS EVIDENCE THAT A FATAL GUNSHOT DISCHARGED DURING A "TUSSLE." THE TRIAL COURT REFUSED TO INSTRUCT ON THE LESSER OFFENSE OF INVOLUNTARY MANSLAUGHTER. THE COURT OF APPEALS REVERSED, FINDING THAT A RATIONAL VIEW OF THE EVIDENCE SUPPORTED THE REQUESTED LESSER-OFFENSE INSTRUCTION. AS THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT SUCH AN INSTRUCTION, THIS COURT SHOULD AFFIRM.

Standard of Review: Appellee does not challenge Appellant's contention that the standard of review is *de novo*.

The prosecution introduced defendant Mendoza's signed statement to the police as Exhibit 42. In that statement Mr. Mendoza described the circumstances surrounding the incident, which occurred at a "bud house" [a place where marijuana is sold]:

> While I was getting my stuff [marijuana], I heard some tussling. I look back and Ivan [Tims] was tussling with the big guy with the deep voice [decedent Stockdale]. They were tussling over a handgun with a dark barrel. While they were tussling, I heard approximately two shots. They then fell into a corner over a chair. I then heard the frail guy [Thurman Chillers] holler . . . He had pulled out a shiny revolver and point it at Ivan and the guy he was tussling with . . . I then tried to knock the gun away from the frail guy. As I was attempting to knock the gun away from the frail guy, he (the frail guy) pulled the trigger. (126a-128a, 130a-132a).

Defendant's counsel requested instructions on various lesser offenses, including an instruction for common-law involuntary manslaughter. The trial court refused to so instruct. (214a-224a).

On appeal to the Court of Appeals, Mr. Mendoza contended that the lesser offense of involuntary manslaughter was justified by the evidence, and that the trial judge's refusal to so charge denied his constitutional rights to a fair trial under the Fourteenth Amendment and Const 1963, Art 1, §17. The Court of Appeals reversed based on the denial of the requested instruction, explaining that

> defendant claimed that after entering the house he heard tussling and turned to see the victim and [codefendant] Tims engaged in a struggle over a gun. Defendant apparently did not know whose gun the two were struggling over or what instigated the scuffle. As the two fought, however, defendant heard shots and then watched as the victim's nephew produced a silver revolver, which he pointed toward both Tims and the victim. According to defendant, as he attempted to knock the revolver away, the victim's nephew pulled the trigger. These facts, if believed by the jury, could support a finding that the victim's killing was an unintended death, without malice, and not caused by any action of defendant naturally tending to cause death. . . [A]n involuntary manslaughter instruction was warranted . . . and the trial court's failure to give such instruction was not harmless. (5a).

The Court of Appeals' ruling need not be set aside because of this Court's decision in *People v Cornell*, *supra*. *Cornell* found that

> the reliability of the verdict is undermined when the evidence "clearly" supports the lesser included instruction, but the instruction is not given. In other words, it is only when there is substantial evidence to support the requested instruction that an appellate court should reverse the conviction.

646 NW2d at 144. Here the Court of Appeals correctly found that there was sufficient evidence to support the requested instruction. Although the Court of

Appeals decision was decided without benefit of *Cornell*, it is certainly sustainable even under the *Cornell* "substantial evidence" formulation.

As noted above, criminal negligence requires the omission to use care and diligence to avert a threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another. *People v Sealy*, 136 Mich App 168, 172-173; 356 NW2d 614 (1984). According to Mr. Mendoza's statement, he had knowledge that Ivan Tims and decedent Stockdale were struggling over a gun, but he did not know what precipitated the struggle. Thurman Chillers then came out with a gun, pointing it at both Tims and Stockdale. Defendant began to struggle with Chillers over his gun.

Defendant did not state that the gun was pointed at him; it was pointed at both Tims and Stockdale. The jury could have found from defendant's statement that defendant did not know who the aggressor was in the Tims/Stockdale conflict. The jury could also have found that he did not know whether Chillers' intent in producing the weapon was to assault Tims, to defend Stockdale, or to accomplish some other goal. Yet defendant began to struggle with Chillers when it must have been apparent to the ordinary man that if Chillers' gun went off, it was likely to, and did, prove disastrous to someone.

The jury could have believed that defendant's conduct evinced the requisite conduct for involuntary manslaughter: a "wantonness and disregard

of the consequences which may ensue, an indifference to the rights of others that is equivalent to a criminal intent." *People v Datema*, 533 NW2d at 277.

In showing the basis for involuntary manslaughter, the Court of Appeals focused on Mr. Mendoza's statement; but additional evidence in the record supported involuntary manslaughter. That evidence, which together with the statement is "substantial" within the meaning of *Cornell*, includes:

- Mr. Mendoza did not test positive for gunshot residue, from which the jury could have inferred that he did not fire or possess a firearm. (47b-48b, 50b). This virtually eliminated the possibility that he was the shooter, and corroborated his statement that he did not have a firearm, but Thurman Chillers did.
- Mr. Mendoza was shot in the chest and twice in the back. (208a; 53b-55b, 57b-58b). From his statement, gunshots erupted from the Tims/Stockdale struggle over a gun, before Mr. Mendoza struck Thurman Chillers' gun. The jury could have inferred that one or more of those Tims/Stockdale gunshots wounded Mr. Mendoza. Being shot, especially being shot multiple times, could significantly affect a person's state of mind, and could have persuaded the jurors that defendant, though still culpable for grossly negligent conduct, did not have the requisite state of mind to be properly convicted of second-degree murder.

- Thurman Chillers, the only alleged eyewitness in the residence, was a drug-dealer helping to run a drug house, in which numerous weapons were found, yet he was apparently not charged with any crimes. (26a, 30a; 6b-7b, 16b, 29b, 56b). These facts seriously undercut his credibility.
- Thurman Chillers tested positive for firing a gun. After he flunked the gunshot-residue test, in order to explain these damning results, he admitted handling guns–but claimed this only happened after the incident. (20b-23b). Scientific proof that Chillers had fired a weapon, yet denied it, strongly corroborated defendant's statement indicating that Chillers had a gun. If Chillers was lying, trying to distance himself from any gunplay, the jury could well have found that Chillers' involvement in the fracas explained and mitigated Mr. Mendoza's conduct.
- Chillers admitted being high on drugs at the time; he also admitted that being high "somewhat" impaired his recall. (15b). This acknowledged impairment was still another reason for the jury to reject his testimony. The jury clearly rejected his testimony at least in part, as it did not convict on first-degree murder; under proper instructions, the jury may well have returned a verdict of involuntary manslaughter.
- Chillers admitted that he frequently kept a gun on his lap while he was dealing drugs, yet claimed that for some reason he was not doing so this

particular time. (32b). Also, Chillers, described as a "frail guy," was a physically unimposing man. The jury could have inferred that he was likely to have kept a gun at hand, as an "equalizer," consistent with his admission that this was his custom.

- Thurman Chillers fled from the scene. (69a-70a; 3b-4b). He claimed he was fleeing from danger, but the jury could have inferred that his flight from a dope den littered with guns was evidence of his own wrongdoing. This inference is even more compelling because he admitted that he later returned, and was busy removing evidence and tampering with the crime scene before the police arrived. (19b-19.1b).
- Chillers was substantially impeached at trial with his prior testimony under oath at the preliminary examination and with his written statement to the police. (10b-13b, 24b-25b).

The jurors were properly instructed that they could believe some, none, or all of Chillers' testimony, and that they could rely on their common sense and everyday experience in evaluating the evidence. (228a-229a). They were also cautioned to consider, in evaluating credibility, whether the circumstances showed the witness exhibited bias, or his testimony had been influenced. (229a-230a). As the foregoing demonstrates, the jurors had numerous reasons to question the testimony of this gun-toting drug dealer, who was clearly intent on

protecting himself, who for some reason was not being prosecuted for his own crimes, and who admittedly had impaired recall of events.

Thus, the "substantial evidence" that supported an involuntary-manslaughter instruction included far more than just defendant's statement.

The facts here compare favorably with those in other cases in which manslaughter instructions were required. In *People v Parney,* 98 Mich App 571; 296 NW2d 568, 575 (1979), there was evidence that defendant returned to decedent's home, distraught. There was a struggle for control of a gun and a continued argument; then defendant followed decedent to the porch and, after a very short period, shot her. The trial court refused to instruct on voluntary and involuntary manslaughter. The Court of Appeals reversed, holding:

> While there was sufficient evidence to support a conviction of second-degree murder, it is equally possible that defendant, although not insane, was sufficiently unbalanced or deranged by his arguments with Ms. Kurtz that he lacked the capacity for malice necessary for a jury to find him guilty of second degree murder. The alternatives should have been presented to the jury for determination.

In *People v Michael Fuqua*, 143 Mich App 133, 139-140; 379 NW2d 396 (1985), during a heated argument, defendant intentionally pointed a gun at the victim, who died as a result of the gun discharging. The Court of Appeals held that the refusal to instruct on involuntary manslaughter was reversible error, because evidence was presented which would have supported such a conviction.

Here, based on defendant Mendoza's statement, the death resulted when he was struggling with Thurman Chillers, and Chillers' gun accidentally discharged. This was consistent with the scientific evidence that it was Chillers who tested positive for gunshot residue, not Mr. Mendoza. (101a, 186a-187a). Further, Chillers had admitted handling a firearm that day. (23b; 80a). The jury could have concluded that the gun discharged as the result of Mr. Mendoza's interference with Chillers, and that the death was an unintended consequence of this, and therefore constituted involuntary manslaughter.

Had an involuntary-manslaughter instruction been given, the gunshot residue and the inconsistencies in the Chillers testimony could well have influenced the jury to settle on involuntary manslaughter, rather than second-degree murder. It is plain that Chillers was not telling the unvarnished truth. In his version, both Tims and Mr. Mendoza came into the drug house with guns, but his uncle was not carrying one; yet the police found several guns and spent shells in the drug house--even after, Chillers himself admitted, he had been going around the house hiding evidence before the police arrived. (31a, 100a).

Here, as in *Fuqua* and *Parney*, the jury could have found from the evidence that the shooting resulted from a firearm being discharged in an altercation, and constituted involuntary manslaughter.

The People argue that this could not be involuntary manslaughter because defendant acted intentionally, asserting that defendant's statement had to mean Chillers "pulled the trigger, not that the gun went off accidentally," and insisting that "either an accidental death occurred, or a murder." (People's Brief, pp 33, 35). This is a false dichotomy, because an accidental death can still constitute involuntary manslaughter. *People v Hess*, 214 Mich App 33; 543 NW2d 332, 335(1998), *lv den* 450 Mich 962; 546 NW2d 251 (1995) ("because involuntary manslaughter is not an intent crime, accident is not a defense to this offense").

Further, defendant's statement that Chillers "pulled the trigger" does not necessarily mean that this was a deliberate act, rather than an accidental or negligent act. The prosecutor cannot authoritatively say what Chillers' state of mind was, or to what extent the pulling of the trigger was volitional. To say that Chillers "pulled the trigger" is equally consistent with a panicked reaction in the midst of a struggle, a muscular spasm, jostling, the slipping of a finger on the trigger, a deliberate but unaimed squeezing of the trigger, or a deliberate–and aimed–squeezing.

Even if Mr. Mendoza's statement could only mean that Chillers deliberately pulled the trigger, the jury could have found that defendant did not have the requisite state of mind to make out murder, only manslaughter.

The People assert: "Defendant's statement illustrated that he was acting in defense of another (specifically, defending Ivan Tims from Chillers) when Defendant tried to knock the firearm out of Chillers' hand." (People's Brief, p 35). But Mr. Mendoza did not state that he was defending Ivan Tims; he did not even know who started the Tims/Stockdale struggle. The jury would not have been obligated to accept the People's view that defendant was engaged in defending Tims.

The People also assert that a manslaughter instruction was not appropriate here because Mr. Mendoza's "claim of accident was to exculpate totally, not to demonstrate that the crime was manslaughter, not murder." (People's Brief, p 33). But the defense's position *at trial* was that defendant's statement provided the means for obtaining a manslaughter verdict. The prosecution errs by speculating on what defendant's subjective intent may have been in originally making the statement, rather than focusing on the use the defense sought to make of the statement at trial, which was plainly to persuade the jury that if defendant was guilty of anything, the appropriate offense was manslaughter, rather than first- or even second-degree murder.

The malice element of second-degree murder "can be inferred from evidence that a defendant *intentionally* set in motion a force likely to cause death or great bodily harm." *People v Djordjevic*, 230 Mich App 459; 584 NW2d

610, 612 (1998), *lv den* 459 Mich 956; 590 NW2d 572 (1999) (emphasis supplied). Here, the defense theory was that through defendant's struggle with Chillers, Chillers' gun accidentally discharged and *unintentionally* caused the fatal wound to his uncle. The jury could have found that defendant's actions caused the Chillers firearm to discharge, but that he did not *intentionally* set in motion the fatal force. Had the jury so found, the facts would not have been consistent with second-degree murder, but rather with involuntary manslaughter, consistent with the instructions sought by the defense.

The People say that a manslaughter instruction was not appropriate because it was "entirely inconsistent" with a defense theory suggested by defense counsel in opening statement: that Ivan Tims shot decedent while defendant was outside, in the car. But a defendant is entitled to advance alternative or inconsistent theories of defense. *People v Young,* 120 Mich App 645; 327 NW2d 329, 331 (1982) ("Our criminal justice system begins with the presumption that a person is innocent until proven guilty and allows an accused to argue inconsistent alternatives . . . It is the jury's province to choose among the competing theories and evidence"); *People v Hoefle*, 276 Mich 428; 267 NW 644, 645 (1936) (accused is entitled to "specific charges upon the law applicable to each of the various hypotheses or combinations of facts" in the case). By seeking

the contested instruction, defense counsel expressly sought to advance the alternative theory of involuntary manslaughter. (220a).

The People erroneously suggest that for common-law involuntary manslaughter based on a shooting, the defendant must personally possess the gun causing the death.

In *People v Zak*, 184 Mich App 1; 457 NW2d 59, 64-65 (1990), the defense was refused an involuntary manslaughter instruction. On appeal, the defense contended that involuntary manslaughter could have been based on defendant's grossly negligent act of accompanying the shooter to the victim's apartment, thus allowing the shooter to have access to the apartment and the opportunity to kill the victim. In rejecting this argument, the Court of Appeals observed:

> While Zak's presence may have been a necessary condition in order for the final confrontation to have occurred, resulting in the killing, Zak's presence was not itself a cause of the homicide. *His presence did not cause Anderson to pull the trigger and mortally wound the victim*. (Emphasis supplied).

In contrast to *Zak*, Mr. Mendoza's statement indicates that his interference *did* cause Chillers to pull the trigger and inflict the mortal wound.

Also, courts of other states have found involuntary manslaughter where someone other than the defendant possessed the firearm. *State v Marti*, 290 NW2d 570 (Iowa, 1980) (defendant guilty of involuntary manslaughter when he loaded a gun, clicked the hammer twice to bring a live round into the chamber,

and then placed the uncocked gun within the reach of his intoxicated, seriously depressed girlfriend); *People v Duffy*, 79 NY2d 611; 595 NE2d 814 (1992) (manslaughter shown where defendant recklessly provided gun to intoxicated and despondent decedent, who had expressed desire to kill himself, and urged decedent to "blow his head off"). Here, the Court of Appeals was correct in implicitly finding that involuntary manslaughter could lie where the fatal shot came from a firearm possessed by another.

The People argue that defendant must do more than invite the jury to speculate, citing *People v Bailey*, 451 Mich 657; 541 NW2d 325 (1996). *Bailey* stated that a trial court need not instruct on a requested lesser-offense "where the record is devoid of *any evidence* supporting such an instruction." *Bailey*, 549 NW2d at 333 (emphasis supplied). Here the Court of Appeals found that the record was *not* devoid of any evidence supporting the instruction. There *was* evidence supporting the defense theory, warranting a new trial.

Appellate judges "often differ on which facts are controlling in deciding whether a jury question has been made out. These are precisely the kinds of issues that intermediate appellate courts are created to resolve." *People v Tyrer*, 385 Mich 484; 189 NW2d 226, 229 (1971). The intermediate appellate court performed its proper function here, and its decision should not be overturned.

Plaintiff argues in this Court, for the first time, that any error in failing to instruct on involuntary manslaughter was harmless. (Plaintiff's Brief on Appeal, pp 39-40). But in the Court of Appeals, the People devoted approximately one page of argument to the issue of involuntary manslaughter.[2] Not one sentence in the People's Brief to the Court of Appeals argued that the harmless-error doctrine precluded relief. That Court's opinion specifically noted that "the prosecutor has made no attempt to demonstrate that the failure to give the requested instruction was harmless . . ." (5a). The Court of Appeals analyzed harmless error as follows:

> We conclude that there is a reasonable possibility that the error contributed to the conviction. Defendant was denied the opportunity to be held criminally culpable of a lesser offense that was supported by the evidence and which encompassed his theory of the case. *Richardson*, *supra*; *Jones*, *supra*. It is equally possible that the jury convicted defendant, not because they believed him to have committed murder, but because they believed him to be criminally culpable and had no choice but to convict of second-degree murder or allow him to go free. The error is not harmless where the jury rejected the primary charge and found defendant guilty of the least serious charge on which it was instructed. *People v Malach*, 202 Mich App 266, 277; 507 NW2d 834 (1993).[3] Accordingly, the error requires reversal and a new trial. (5a).

Despite this ruling, the People did not address harmless error, but sought "rehearing only on the issue of whether the jury should have been instructed on involuntary manslaughter." Motion for Rehearing, ¶ 5. This Court should not

[2]Defendant asks this Court to take judicial notice under MRE 201(c) of Plaintiff's Brief on Appeal to the Court of Appeals, pp 17-18.
[3]*Lv den* 444 Mich 974; 518 NW2d 478 (1994).

consider the question of harmless error, which the People did not see fit to raise in the Court below.[4]

Moreover, the Court of Appeals correctly found that the error was not harmless. The People erroneously argue that the jury would not have based involuntary manslaughter on defendant's statement, in light of what the People claim is the undisputed physical evidence. The People claim:

> Under Defendant's scenario, the shooting would have occurred at close range. Yet the medical examiner testified that there was no evidence of close-range firing, and the decedent was not wearing a shirt at the time he was shot so had there been close-range firing, stippling and soot would have been evident on decedent's chest. (People's Brief, p 39).

This argument omits or distorts important facts at trial. The web area of Thurman Chillers' right hand "came up positive" on a gunshot residue test for firing a gun, strongly indicating he had recently fired a weapon.[5] (101a, 186a). However, there was a "very strong possibility scientifically" that particles found on Mr. Mendoza were not gunshot residue. (50b).

A gunshot wound to Stockdale's chest was the cause of death. (179a). There was no evidence of close-range firing (within two feet) on the skin around

[4]*See People v Tyler*, 399 Mich 564; 250 NW2d 467, 470-471 (1977) (where People did not challenge a defendant's standing to raise search and seizure issue in Court of Appeals, Supreme Court would not consider question of standing).
[5]Or had been standing in very close proximity to somebody else who had fired a weapon.

the entry wound. (181a). Defendant's statement did not purport to measure the distances between the various individuals at the time the gun discharged.

On those facts, defendant did not require a "scenario" under which involuntary manslaughter could only have occurred if the shooting took place within two feet, leaving stippling or soot on decedent's chest. The People's argument simply reflects the People's view of the evidence. The People attempt to ignore the evidence favoring the defense theory, based on defendant's statement, that the death resulted when Mr. Mendoza was struggling with Thurman Chillers, and Chillers' gun accidentally discharged. This theory was buttressed by the scientific evidence that Chillers tested positive for gunshot residue, and Chillers admitted handling a firearm the day of the incident. The scientific evidence did not show that Mr. Mendoza had gunshot residue. The jury could have concluded from this evidence that the death was an unintended consequence of Mr. Mendoza's struggle with Chillers, and therefore constituted involuntary manslaughter.

Defendant was originally charged with first-degree murder. The jurors convicted him of second-degree murder, implicitly finding there was no premeditation or deliberation. They were left with a stark choice between second-degree murder, and not guilty. If the jurors felt that defendant had contributed to the death by associating himself with a gun-wielding codefendant,

they had no way to express that in their verdict. If the jurors believed defendant had contributed even indirectly to decedent's death, it was highly unlikely that they would have exonerated him with a not-guilty verdict. Mr. Mendoza's defense was severely prejudiced by the trial court's refusal to allow the jury to consider this lesser offense. The Court of Appeals so found, citing *People v Malach*, *supra*. That Court was correct.

Here, the jury acquitted on the principal charge, first-degree murder, but convicted on the lowest alternative available, second-degree murder. The jury was not properly instructed on involuntary manslaughter, although it was requested and was supported by substantial evidence. By forcing an "all or nothing verdict" the trial court usurped the province of the jury, and may have caused the jurors to convict on murder because they were reluctant to acquit someone they believed was guilty of a lesser crime.

Moreover, the Fourteenth Amendment due-process right to a fair trial was abridged, under the previously detailed circumstances of this case, by denial of the requested instruction on the lesser included offense of involuntary manslaughter. *Cf. Bagby v Sowders*, 894 F2d 792, 797 (CA 6, 1990).[6]

[6]*Bagby* held that failure to instruct on a lesser included offense in a noncapital case is not "such a fundamental defect as inherently results in a miscarriage of justice or an omission inconsistent with the rudimentary demands of fair procedure." However, Mr. Mendoza is not claiming a per se fundamental defect, but rather that, on the facts here, refusal to instruct on manslaughter caused a miscarriage of justice and denied the due-process right to a fair trial.

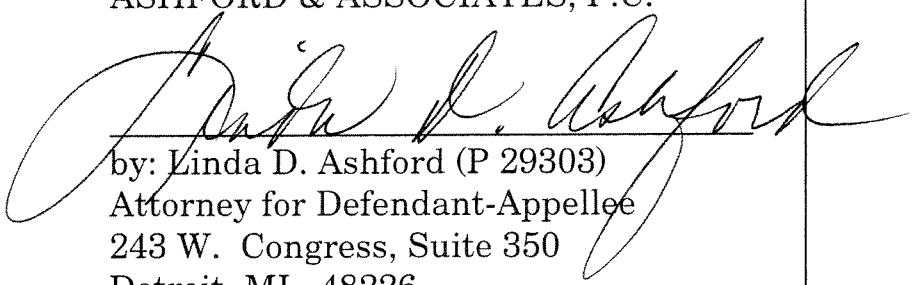
The Court of Appeals properly found that the failure to instruct on involuntary manslaughter was non-harmless error requiring a new trial.

RELIEF REQUESTED

This Court should find that leave was improvidently granted, and dismiss, or alternatively affirm the Court of Appeals decision in this case.

Respectfully submitted,

ASHFORD & ASSOCIATES, P.C.



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